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TAN LEE HENG & ANOR v. KETUA PENGARAH, JABATAN PENDAFTARAN NEGARA & ORS

HIGH COURT MALAYA, KUALA LUMPUR
NORDIN HASSAN J
[JUDICIAL REVIEW NO: WA-25-60-02-2018]
B 27 DECEMBER 2018

ADMINISTRATIVE LAW: *Judicial review – Application for – Application to quash decision of Director General of National Registration Department – Original birth certificate acknowledged child born to Malaysian father and Indonesian mother – National Registration Department amended original birth certificate and issued new one – Amendment of birth certificate altered child's citizenship status – Whether there was error of law in revoking original birth certificate and issuing amended birth certificate – Whether Director General of National Registration Department acted within legal power prescribed under law – Whether child Malaysian citizen by operation of law – Federal Constitution, art. 14(1)(b)*

CIVIL PROCEDURE: *Judicial review – Application for – Application to quash decision of Director General of National Registration Department – Original birth certificate acknowledged child born to Malaysian father and Indonesian mother – National Registration Department amended original birth certificate and issued new one – Amendment of birth certificate altered child's citizenship status – Whether amendments made in accordance with requirements under s. 27(3) of Births and Deaths Registration Act 1957 – Rules of Court 2012, O. 53 r. 3(2)*

The second applicant was born in Malaysia, to a Malaysian father ('the first applicant') and an Indonesian mother. The second applicant's parents were married in Indonesia but the marriage was not registered in Malaysia. The birth of the second applicant was registered at the National Registration Department ('NRD') where a birth certificate and a MyKid card was issued. In the birth certificate, it was stated that (i) the second applicant's citizenship was Malaysian; (ii) the first applicant was her father; and (iii) her mother was an Indonesian citizen. When the second applicant attained the age of 12, the applicants went to the NRD to apply for the second applicant's MyKad card. The first applicant filled up and signed certain forms which, unbeknown to him, altered the information in the second applicant's birth certificate. The first respondent rejected the second applicant's application for MyKad, revoked the latter's birth certificate and issued an amended one ('amended birth certificate'), pursuant to sub-s. 27(3) of the Births and Deaths Registration Act 1957 ('Act'). In the amended birth certificate, (i) the second applicant was not a Malaysian citizen and her race was amended, from 'Cina', to 'Indonesia'; and (iii) the first applicant was not stated as the second applicant's father and, in the relevant column, it was only stated as

'maklumat tidak diperolehi'. Hence, the present application for judicial review, pursuant to O. 53 r. 3(2) of the Rules of Court 2012 ('ROC'). The reliefs sought by the applicants were, *inter alia*: (i) an order of *certiorari* to quash the first respondent's decision; (ii) a declaration that the second applicant was a citizen by operation of law, under art. 14(1)(b) of the Federal Constitution ('FC'); and (iii) an order of *mandamus* instructing the first respondent to reinstate the second applicant's original birth certificate and to issue a MyKad to the second applicant. In support of the application, the applicants argued that the first respondent (i) committed an error of law in revoking the second applicant's original birth certificate and issuing the amended birth certificate; and (ii) acted without any legal power and not in accordance with the law. Objecting to the applicants' application, the respondents argued that the applicants failed (i) to show that the amendments in the amended birth certificate was wrong in law; and (ii) to satisfy the requirement to be a Malaysian citizen by operation of law under art. 14(1)(b) of the FC.

Held (allowing application):

(1) Under s. 27(3) of the Act, any amendment to a birth certificate may be made after the requirements set in the provision has been fulfilled. The requirements, *inter alia*, are: (i) the production of a statutory declaration, setting forth the nature and error to be corrected and the true facts of the case by the person requiring such error to be corrected; and (ii) made by two persons required by the Act to give information concerning the birth; or (iii) by two credible persons having knowledge of the truth of the case. Section 27(3) of the Act also provides that the amendment to be made without any alteration to the original entry. What is most important about this provision is that the amendment must be upon the request of the person who wanted any information, in the birth certificate, to be amended. (paras 14-16)

(2) The first applicant made an application for MyKad for the second applicant and filled up the application forms. It was devoid of logical sense that, at the same time, the first applicant applied for the amendments of the second applicant's birth certificate, which adversely affected her status. The effect of the amendments clearly barred the first applicant from obtaining the second applicant's MyKad, which was the only reason the applicants came to the NRD. The first applicant's explanation, that he was asked to fill up certain forms which he thought were in relation to the MyKad application, was accepted. The amendments were not sought for by the first applicant and the amendments were not due to any clerical or technical error. Additionally, the amendments altered the original entry in the birth certificate. This clearly was not in accordance with the provision of s. 27(3) of the Act. (paras 17-19 & 21)

(3) The second applicant was registered as a citizen of Malaysia and issued a MyKid by the first respondent. The question that arose was: which provision of the law empowered the first respondent to revoke the second applicant's citizenship by amending her birth certificate? The first respondent's averment, that the amendments were made pursuant to s. 27(3) of the Act, was an error of law. Although a citizenship may be terminated in accordance with Chapter II of the FC, in particular under art. 126, this was not relied upon by the first respondent. (paras 24-27)

(4) The second applicant's citizenship was by operation of law, based on the concept of *jus soli* and *jus sanguinis*, which were embedded in art. 14(1)(b) read with s. 1(a), Part II, Second Schedule of the FC. The second applicant was born in Malaysia and her biological father, the first applicant, was a Malaysian citizen. As such, the requirement under art. 14(1)(b) of the FC had been complied with for the second applicant to be accorded citizenship by operation of law. The issue that the second applicant's biological parents were not legally married did not affect the second applicant's rights to be a citizen by operation of law or diminish the parents' capacities as parents of the second applicant. In addition to that, the second applicant was not a citizen of Indonesia as she was born in Malaysia and her birth was registered in Malaysia. If the second applicant was not a citizen of Malaysia, she would then be stateless and this would not be in her best interest and welfare. This triggered the application of art. 14(1)(b) read with s. 1(e), Part II, Second Schedule of the FC. (paras 28, 32-33 & 37)

(5) The decision of the first respondent was tainted with error of law, irrationality and unreasonableness which warranted a curial intervention of the court. Further, the first respondent's decision to amend the second applicant's birth certificate, which had the effect of, *inter alia*, revoking her citizenship, was set aside. (paras 40 & 41)

Case(s) referred to:

Akira Sales & Service (M) Sdn Bhd v. Nadiah Zee Abdullah & Another Appeal [2018] 2 CLJ 513 FC ***(refd)***

Dato' Seri Dr Ahmad Zahid Hamidi, Menteri Dalam Negeri, Kementerian Dalam Negeri & Ors v. Soo Lina & Ors [2018] 6 CLJ 285 CA ***(refd)***

Madhuvita Janjara Augustin (suing through next friend Margaret Louisa Tan) v. Augustin Lourdsamy & Ors [2018] 4 CLJ 758 CA ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***

Pendaftar Besar Kelahiran Dan Kematian, Malaysia v. Pang Wee See & Anor [2017] 7 CLJ 33 CA ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***

Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri & Ors [2014] 6 CLJ 541 FC ***(refd)***

Legislation referred to:

Births and Deaths Registration Act 1957, s. 27(3)

Federal Constitution, arts. 14(1)(b), 18(3), 26, Second Schedule Part II, s. 1(a), (e)

Rules of Court 2012, O. 53 r. 3(2)

For the applicants - Nik Asilah Aziz; M/s Zahir Jeya & Zainal

For the respondents - Maisara Juhari; SFC

Reported by Najib Tamby

JUDGMENT

Nordin Hassan J:

Introduction

[1] This is the applicants' judicial review application against the decision of the first respondent on 27 November 2017 to revoke the second applicant's birth certificate and issuing an amended birth certificate which has the effect of revoking the second applicant's Malaysian citizenship.

[2] The reliefs sought by the applicants, among others are:

(i) an order of *certiorari* to quash the said decision.

(ii) a declaration that the second applicant is a citizen by operation of law under art. 14(1)(b) of Federal Constitution.

(iii) an order of *mandamus* instructing the first respondent to reinstate the second applicant's original birth certificate and to issue a MyKad to the second applicant within 14 days from the date of the court's order.

The Salient Facts

[3] Based on the affidavits and documentary evidence before this court, the material established facts are the following:

(i) The first applicant is a citizen of Malaysia, born in Sg. Pelek, New Village, Selangor on 10 December 1954.

(ii) The first applicant is the biological father of the second applicant who was born in Malaysia on 29 May 2005. The biological mother of the second applicant is an Indonesian citizen known as Leena.

(iii) The marriage of the first applicant and Leena was not registered in Malaysia.

(iv) The birth of the second applicant was registered at the National Registration Department by both the first applicant and Leena where a birth certificate No. BN72109, serial No. F923875 was issued on 29 June 2005. The citizenship of the second applicant in the birth certificate is Malaysian and the father is the first applicant. In this birth certificate, it also states that the mother is Leena an Indonesian citizen.

(v) A MyKid card was also issued by the Registration Department in the second applicant's name.

(vi) The first applicant in his affidavit states that he and Leena was married in Surabaya, Indonesia and thereafter stayed in Malaysia. However, after the birth of the second applicant and having registered the said birth, Leena went back to Indonesia leaving both the first and second applicants. The first applicant then raised the second applicant and provided for her education until now.

(vii) When the second applicant attained the age of 12, the applicants went to the National Registration Department to apply for the second applicant's 'MyKad'. The first applicant was then asked to fill-up and sign certain forms which the first applicant thought they were in relation to the application for 'MyKad'. It turned out later that the forms were for the alteration of information in the second applicant's birth certificate.

(viii) In any event, the second applicant's application for 'MyKad' was rejected by the first respondent. The first respondent has also revoked the second applicant's birth certificate and issued an amended birth certificate pursuant to sub-s. 27(3) of the Births and Deaths Registration Act 1957.

(ix) In this new birth certificate, the amendments made are as follows:

(a) the second applicant is not Malaysian citizen.

(b) the second applicant's race has been amended from "Cina" to "Indonesia".

(c) the first applicant is not stated as the father of the second applicant and in the relevant column, it only states "maklumat tidak diperolehi".

(x) Dissatisfied with the decision of the first respondent, the applicants filed this judicial review application.

The Applicants' Grounds For The Judicial Review Application

[4] Based on the statement filed pursuant to O. 53 r. 3(2) of the Rules of Court 2012 and submission made by counsel for the applicants, the grounds for this judicial review application can be summarised as follows:

(i) The first respondent committed an error of law in revoking the second applicant's original birth certificate and issuing the amended birth certificate pursuant to sub-s. 27(3) of the Births and Deaths Registration Act 1957.

(ii) The removal of status of citizenship of the second applicant by the first respondent was made without any legal power and not in accordance with the law. Further, the second applicant is a Malaysian citizen by operation of law under art. 14(1)(b) of the Federal Constitution.

The Respondents' Submission

[5] Conversely, Senior Federal Counsel acting for the respondents submits, in essence, the following:

(i) The applicants failed to show that the amendments to the second applicant's birth certificate is wrong in law.

(ii) The applicants failed to satisfy the requirement to be a Malaysian citizen by operation of law under art. 14(1)(b) of the Federal Constitution.

Findings Of This Court

[6] The position of the law on judicial review is well settled that the court not only can review the decision-making process but also the merit of the decision.

[7] In a recent Federal Court case of *Akira Sales & Service (M) Sdn Bhd v. Nadiah Zee Abdullah & Another Appeal* [2018] 2 CLJ 513; [2018] 2 MLJ 537 the liberal approach on judicial review in *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145 has been emphasised at pp. 547 & 548 (CLJ); p. 571 (MLJ) as follows:

> [45] In the same appeal, Edgar Joseph Jr FCJ (Eusoff Chin in agreement) said that an award could be reviewed for substance as well as for process:
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> > It is often said that judicial review is concerned not with the decision but the decision making process. (See eg *Chief Constable of North Wales Police v. Evans* [1982] 1 WLR 1155). This proposition, at full face value, may well convey the impression that the jurisdiction of the courts in Judicial Review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected. Put differently, in the words of Lord Diplock in *Council of Civil Service*

Unions & Ors v. Minister for the Civil Service [1985] AC 374, where the impugned decision is flawed on the ground of procedural impropriety.

But Lord Diplock's other grounds for impugning a decision susceptible to Judicial Review make it abundantly clear that such a decision is also open to challenge on grounds of 'illegality' and 'irrationality' and, in practice, this permits the courts to scrutinise such decisions not only for process, but also for substance.

> In this context, it is useful to note how Lord Diplock (at pp 410-411) defined the three grounds of review, *to wit*, (i) illegality, (ii) irrationality, and (iii) procedural impropriety. This is how he put it:
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> By 'illegality' as a ground for Judicial Review, I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
>
> By 'irrationality', I mean what can by now be succinctly referred to as '*Wednesbury* unreasonableness' (see *Associated Provincial Picture Houses Ltd v. Wednesbury Corp.* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the courts' exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v. Bairstow* [1956] AC 14, or irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by Judicial Review.
>
> I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decisions. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that the expressly laid down in the legislative

> instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

Lord Diplock also mentioned 'proportionality' as a possible fourth ground of review which called for development.

[8] The Court of Appeal in *Dato' Seri Dr. Ahmad Zahid Hamidi, Menteri Dalam Negeri, Kementerian Dalam Negeri & Ors v. Soo Lina & Ors* [2018] 6 CLJ 285; [2018] 2 MLJ 738 touches the test of reasonableness in judicial review at p. 301 (CLJ); p. 754 (MLJ) as follows:

> [39] The test of reasonableness has been the subject of many cases over the decades in other Commonwealth jurisdictions. For example, in dealing with the circumstances under which the court could intervene to quash the decision of an administrative officer or tribunal on ground of unreasonableness or irrationality, Henchy J of the Irish Court in *The State (at the Prosecution of John Keegan and Eoin J Lysaght) v. The Stardust Victims' Compensation Tribunal* [1986] IR 642 set a number of such circumstances in different terms. They are:
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> 1. It is fundamentally at variance with reason and common sense.
> 2. It is indefensible for being in the teeth of plain reason and common sense.
> 3. Because the court is satisfied that the decision-maker has breached his obligation whereby the 'must not flagrantly reject or disregard fundamental reason common sense in reaching his decision.
>
> [41] In *Meadows v. Minister for Justice Equality and Law Reform and others* [2010] IESC 3 Denham J in her *dicta* (*ratio*) set out the following test:
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> > This test includes the implied constitutional limitation of jurisdiction of all decision-making which affects rights and duties. *Inter alia*, the decision-maker should not disregard fundamental reason or common sense in reaching his or her decision. The constitutional limitation of jurisdiction arises *inter alia* from the duty of the courts to protect constitutional rights. When a decision-maker makes a decision which affects rights then, or reviewing the reasonableness of the decision: (a) the means must be rationally connected to the objective of the legislation and not arbitrary, unfair or based on irrational considerations; (b) the rights of the person must be impaired as little as possible; and (c) the effect on rights should be proportional to the objective.

[9] Further a decision which involves an error of law is subject to judicial review as explained by the Federal Court in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65; [1999] 3 MLJ 1, where it states:

> In our view, therefore, unless there are special circumstances governing a particular case, notwithstanding a privative clause, of the 'not to be challenged, etc' kind, judicial review will lie to impeach all errors of law made by an administrative body or tribunal and, we would add, inferior courts. In the words of Lord Denning in *Pearlman v. Harrow School (ibid)* at p 70, '... no court or tribunal has any jurisdiction to make an error of law on which the decision in the case depends. If it makes such an error, it goes outside its jurisdiction and *certiorari* will lie to correct it.

[10] The meaning of error of law has also been explained in the case of *Syarikat Kenderaan Melayu Kelantan v. Transport Workers Union* [1995] 2 CLJ 748; [1995] 2 MLJ 317 in the following words:

> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But it may be said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an *Anisminic* error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law.

[11] Next, in a judicial review, the test applicable is the objective test as was held by Federal Court in the case of *Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri & Ors* [2014] 6 CLJ 541; [2014] 4 MLJ 765, as follows:

> (1) (per Arifin Zakaria Chief Justice) It is trite that the test applicable in judicial review now is the objective test. In considering whether the Court of Appeal had applied the correct test, it is pertinent to consider the whole body of the judgments of the judges of the Court of Appeal and not by merely looking at the terms used in the judgments. The courts will give great weight to the views of the Executive on matters of national security. The Court of Appeal had applied the objective test in arriving at its decision. Had it applied the subjective rest, it would not be necessary for it to consider the substance of the first respondent's decision.

[12] Guided by the above principles of law, I now revert the issues in the present case.

Amendments Of The Second Applicant's Birth Certificate

[13] On this issue, the first respondent at para. 4.9 of his affidavit in reply, stated that the second applicant's birth certificate was amended pursuant to sub-s. 27(3) of the Births and Deaths Registration Act 1957 ('Act 299') and for ease of reference, this provision is reproduced here as follows:

> (3) Any error of fact or substance in any register may be corrected by entry (without any alteration of the original entry) by the Registrar-General upon payment of the prescribed fee and upon production by the person requiring such error to be corrected of a statutory declaration setting forth the nature of the error and the true facts of the case, and made by two persons required by this Act to give information concerning the birth, still-birth or death with reference to which the error has been made, or in default of such persons then by two credible persons having knowledge to the satisfaction of the Registrar-General of the truth of the case; and the Registrar-General may if he is satisfied of the facts stated in the statutory declaration cause such entry to be certified and the day and the month and the year when such correction is made to be added thereto.

[14] Reading the plain wordings of this sub-s. 27(3), any amendment, and in the present case, to a birth certificate, may be made after the requirements set in the provision has been fulfilled. The requirements among others are as follows:

(i) production of a statutory declaration setting forth the nature and error to be corrected and the true facts of the case by the person requiring such error to be corrected; and

(ii) made by two persons required by this Act to give information concerning the birth; or

(iii) by two credible persons having knowledge of the truth of the case.

[15] This sub-s. 27(3) also provides that the amendment be made without any alteration to the original entry.

[16] Be that as it may, what is most important in relation to this provision is that the amendment must be upon request of the person who wanted any information in the birth certificate to be amended.

[17] In this regard, the undisputed facts here is that, the first applicant has made an application for 'MyKad' for her daughter, the second applicant, and has filled up the application forms as exhibited in the affidavit of the first respondent marked as 'RA2'.

[18] As such, it is devoid of logical sense that at the same time, the first applicant has applied for the amendments of her daughter's birth certificate which adversely affects her daughter's status. The amendments have changed her daughter's status from Malaysian citizen to non-citizen and the race from 'Cina' to 'Indonesia'. Further, the first applicant is not registered as the father of the second applicant.

[19] The effect of these amendments clearly barred the first applicant to obtain the second applicant's MyKad which was the only reason the applicants came to the Registration Department. Hence, I accept the first applicant's explanation that he was asked to fill up certain forms which he thought was in relation to the MyKad's application.

[20] In addition, the law is strict in regard to the amendment of information in the birth certificate as alluded to earlier and as revealed in Hansard (Parliamentary Debate) of 6 July 2009 where it states:

> Setiausaha Parlimen Kementerian Hal Ehwal Dalam Negeri (Dato' Paduka Haji Abdul Rahman bin Ibrahim): Tuan Yang di-Pertua, terima kasih kepada Ahli Yang Berhormat bagi Bukit Mertajam. Ahli Yang Berhormat bagi Bukit Mertajam ada membangkitkan isu-isu mengenai maklumat dalam dokumen sijil kelahiran.
>
> Bagi maklumat Ahli Yang Berhormat, maklumat yang terdapat di dalam Sijil Kelahiran adalah maklumat dan keterangan semasa kanak-kanak tersebut dilahirkan. Semua maklumat tersebut diberikan oleh orang-orang yang mengetahui mengenai kelahiran tersebut seperti ibu bapanya sendiri, datuk atau nenek dan keluarga di kedua-dua belah ibu bapa kepada kanak-kanak tersebut. Maklumat yang akan diberikan oleh pemaklum, di dalam borang pemaklum iaitu nama kanak-kanak, tempat dan masa kelahiran, berat badan kanak-kanak, keterangan ibu-bapa serta dokumen yang dipegang, keturunan, keterangan pemaklum serta agama ibu bapa.
>
> Sebelum November 2005, agama kanak-kanak ditentu melalui sistem generate, yang ditentukan oleh agama bapa kanak-kanak tersebut, tetapi selepas November 2005, agama kanak-kanak ditentukan oleh pemaklum sendiri. Ketentuan diambil memandangkan banyak perkahwinan yang berlaku sekarang adalah terdiri daripada pasangan yang berbeza anutan.
>
> Dengan perubahan ini, masalah kecuaian di kaunter pendaftaran kelahiran dan masalah tiada persetujuan ibu bapanya adalah tidak timbul kerana agama kanak-kanak adalah ditentukan sendiri oleh ibu bapa mereka. Sebagaimana yang dinyatakan di atas, keterangan ini adalah keterangan semasa kanak-kanak dilahirkan sahaja. Sebarang perubahan maklumat setelah kanak-kanak tersebut membesar tidak membolehkan maklumat di dalam Sijil Kelahiran dipinda dengan sewenang-wenangnya. Pindaan butiran di dalam Sijil Kelahiran hanya dibenarkan oleh undang-undang jika terdapat kesilapan perkeranian ataupun kesilapan teknikal sahaja. Pindaan kerana dengan sengaja ingin meminda untuk keperluan peribadi tidak diizinkan.

[21] In the present case, the amendments were not sought for by the first applicant and the amendments are not due to any clerical or technical error. Additionally, the amendment has altered the original entry in the birth certificate. This clearly, is not in accordance with the provision of sub-s. 27(3) of the Act 299.

[22] As mentioned earlier, the amendment to the second applicant's birth certificate, has changed her status from Malaysian citizen which was accorded to her upon the registration of her birth on 29 June 2005 to a non-citizen 12 years later on 27 November 2017, when the amended birth certificate was issued by the first respondent.

[23] In this regard, art. 18(3) of the Federal Constitution provides: A

> (3) A person registered as a citizen under this Constitution shall be a citizen by registration from the day on which he is so registered.

[24] Here, the second applicant was registered as a citizen of Malaysia on 29 June 2005, she was also issued a 'MyKid' card by the first respondent. Now, the question is under which provision of the law that empowers the first respondent to revoke the second applicant's citizenship by amending her birth certificate. B

[25] The first respondent in his affidavit clearly states that the amendments, which have the effect of revoking the second applicant's citizenship were made pursuant to sub-s. 27(3), Act 299 which to me, is an error of law. C

[26] In connection to this, citizenship may be terminated in accordance with Chapter 2 of the Federal Constitution and in particular art. 26 which states: D

> Other provisions for deprivation of citizenship by registration or naturalisation
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> 26(1) The Federal Government may by order deprive of his citizenship any citizen by registration or by naturalisation if satisfied that the registration or certificate of naturalisation: E
>
> (a) was obtained by means of fraud, false representation or the concealment of any material fact; or
>
> (b) was effected or granted by mistake.

[27] However, this art. 26 was not relied upon by the first respondent and there is no cogent evidence to support the application of this art. 26. F

[28] Further, I find, the second applicant's citizenship is by operation of law based on the concept of *jus soli* and *jus sanguinis* which are embedded in art. 14(1)(b) read with s. 1(a), Part II, Second Schedule of the Federal Constitution.

[29] Article 14(1)(b) provides: G

> Citizenship by operation of law
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> 14(1) Subject to the provisions of this Part, the following persons are citizens by operation of law, that is to say: H
>
> (a) every person born before Malaysia Day who is a citizen of the Federation by virtue of the provisions contained in Part 1 of the Second Schedule; and
>
> (b) every person born on or after Malaysia Day, and having any of the qualifications specified in Part II of the Second Schedule. I

[30] Section 1(a), Part II of Second Schedule states the following:

CITIZENSHIP BY OPERATION OF LAW OF PERSONS BORN ON OR AFTER MALAYSIA DAY

1. Subject to the provisions of this Part III of this Constitution, the following persons born on or after Malaysia Day are citizens of law, that is to say:

(a) every person born within the Federation of whose parents one at least is at time of the birth either a citizen or permanently resident in the Federation; and.

[31] In this regard, it is instructive to make reference to the Court of Appeal case of *Pendaftar Besar Kelahiran dan Kematian, Malaysia v. Pang Wee See & Anor* [2017] 7 CLJ 33, where the concept of *jus soli* and *jus sanguinis* has been explained as follows:

> [29] In determining citizenship of a person, two concepts are commonly applied, namely the concept of *jus soli* and the concept of *jus sanguinis*. *Jus soli* which means 'right of the soil', and commonly referred to as birth right citizenship, is the right of anyone born in the territory of a state to nationality or citizenship. The determining factor being the place or territory where a person was born. In the case of *jus sanguinis*, which in Latin means 'right of blood', is a principle of nationality law by which citizenship is not determined by place of birth but by having one or both parents who are citizens of the state. Viewed from the context of these two concepts, we are of the considered opinion that art 14(1)(b) read with s. 1(a), Part II, Second Schedule of the Federal Constitution is a provision which is anchored on the elements of both the concepts of *jus sanguinis* and of *jus soli*, whereby citizenship of a person is traceable to the place of birth namely, Malaysia, as well as Malaysian citizenship of one of the person's parents (the right of blood) at the time of the person's birth, in order to be a Malaysian citizen by operation of law, under art 14(1)(b) read with s 1(a), Part II, Second Schedule of the Federal Constitution.
>
> [31] What had become clear to us had been that one of the key ingredients stipulated in art 14(1)(b) read together with s 1(a) of Part II of the Second Schedule of the Federal Constitution, is that the person seeking to be a citizen of Malaysia *via* this specific constitutional provision must show proof that when he was born in this country, one of his parents must either be a citizen of Malaysia or was permanently resident in this country. The phrase that is employed under that provision reads, 'is at the time of the birth'. To our minds, that phrase has categorically made a reference to the biological parent of the person, who must either be a Malaysian citizen or a person who is permanently resident in Malaysia. By virtue of this phrase, any person intending to claim citizenship by operation of law under the above stated constitutional provision, it is not sufficient that he or she was born in Malaysia. He must be a person, whose either parent was a Malaysian citizen or a Malaysian permanent resident, when he was born in Malaysia. That provision does not contain any reference to an adoptive, *albeit* a Malaysian adoptive parent.

[32] Reverting to the facts in the present case, the second applicant was born in Malaysia and her biological father, the first applicant, is a Malaysian citizen. As such, the requirement under art. 14(1)(b) of the Federal Constitution has been complied with for the second applicant to be accorded citizenship by operation of law.

[33] The issue that the second applicant's biological parents were not legally married does not affect the second applicant's rights to be a citizen by operation of law or diminish the parents' capacities as parents of the second applicant.

[34] In another Court of Appeal case of *Madhuvita Janjara Augustin (suing through next friend Margaret Louisa Tan) v. Augustin a/l Lourdsamy & Ors* [2018] 4 CLJ 758; [2018] 1 MLJ 307, the court further explained on this issue, in the following words:

> [46] In the case of art 14(1)(b) read with sections 1(a) Part II, Second Schedule of the Federal Constitution, citizenship by operation of law is anchored on elements of both concepts of *jus soli* and of *jus sanguinis*. Citizenship is claimed by virtue of these two rights, right of being born in the territory of Malaysia and by right of one or both parents who are themselves, citizens of Malaysia.
>
> [47] Whether any person including the appellant fulfils the requirements and qualifications prescribed in art 14(1)(b) read with s. 1(a) Part II, Second Schedule of the Federal Constitution, is a question of mixed fact and law.

[35] The court then elaborate further and said this:

> [49] The appellant says one of her parents, that is, her father is a citizen at the time of her birth whereas the second and third respondents contend that s. 17 of Part III of the Second Schedule operates to prevent her from referring to or relying on her father as making up her parents because she is illegitimate. Until she is legitimised, she is obliged to refer to her mother as her lawful parent. Since her mother is not a citizen of Malaysia, the appellant cannot claim citizenship by operation of law under art 14(1)(b).
>
> [50] With respect, we disagree.
>
> [51] In the first place, art 14(1)(b) read with s 1(a) of Part II of the Second Schedule does not make reference to the nature of state of the capacity of 'parents'; the term 'parents' is not qualified in any manner or form in art 14. Certainly, it is not qualified by the word 'lawful', 'natural', 'biological', 'adopted' or even 'surrogate', or any other description or adjective. It simply refers to the capacity of 'parents'. Harkening back to the principles to be adopted when construing and interpreting the Federal Constitution as expressed on *Dato' Menteri Othman bin Baginda*, one is reminded that judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. As a 'living piece of

A legislation', the provisions in the Federal Constitution must be construed broadly and not in a pedantic way. The court must recognise that the construction of the provisions of the Federal Constitution must be 'with less rigidity' and more generosity than other statutes' because the Federal Constitution is *sui generis*, 'calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary B rules and presumptions of statutory interpretation'. Since art 14(1)(b) has not qualified the term 'parents', it is inappropriate to do so.

[36] At para. 60, of the grounds of judgment, the Court of Appeal concluded as follows:

C [60] We further find that the fact that Augustine a/l Lourdsamay and Margaret Luisa Tan, the biological parents of the appellant were not married to each other at the time of the appellant's birth does not alter or diminish their capacities as parents of the appellant.

[37] Aside from this, the second applicant is not a citizen of Indonesia as D she was born in Malaysia and her birth was registered in Malaysia. Hence, if she is not citizen of Malaysia, she is then stateless and this is not in the best interest and for the welfare of the second applicant. This then triggers the application of art. 14(1)(b) read with s. 1(e) of Part II of Second Schedule of Federal Constitution.

E Section 1(e) states:

1. Subject to the provisions of Part III of this Constitution, the following persons born on or after Malaysia Day are citizens by operation of law, that is to say

(e) every person born within the Federation who is not born a F citizen of any country otherwise than by virtue of this paragraph.

[38] This issue has also been discussed in *Madhuvita*'s case and it was decided as such:

G [77] Coming back to the present appeal, in support of her application, the appellant has shown that she is not a citizen of Papua New Guinea. The appellant's birth was not registered in Paua New Guinea. It was registered here instead. We agree with the submissions of learned counsel for the appellant that if the declaration sought is not given, if the appellant is not a citizen of the Federation, then she is stateless. That state would not and cannot be said to be in the best interest and for the welfare of the H appellant. Consequently, the appellant satisfies the terms of art 14(1)(b) read with s. 1(e) of Part II of the Second Schedule to the Federal Constitution.

I

[39] Based on the above reasons and authorities cited, the second applicant is in fact a Malaysian citizen by operation of law.

Conclusion

[40] In the circumstances, I find, the decision of the first respondent in the present case is tainted with error of law, irrationality and unreasonableness which warrants a curial intervention of this court.

[41] Further, the first respondent's decision to amend the second applicant's birth certificate which has the effect among others, revoking the second applicant's citizenship is set aside.

[42] The court also allowed the reliefs prayed for at paras (b), (c) and (d) of encl. 1.

[43] The respondents are to pay costs of RM6,000 to the applicants.